Nos. 87-253 and 87-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

CHAN KENDRICK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. All active Catholic Bishops in the United States are members of the Conference. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, the economy, communications and housing. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the

Catholic Church and its people throughout the United States. Litigation implicating the Religion Clauses of the first amendment to the Constitution is of particular concern.

In accord with its longstanding interest in the proper interpretation of the Religion Clauses, the Conference participated in this case before the district court as *amicus curiae*. In that court, the Conference stressed the importance of applying the first amendment consistent with its generative history. The district court ruled that a federal statute designed to allow religious organizations to participate on an equal basis with other nonprofit, charitable, and community groups in a program created to alleviate the national problems of teenage pregnancies and adolescent premarital sex is unconstitutional under the Establishment Clause.

The district court's opinion is not only inconsistent with the historical purposes of the Establishment Clause, but it discriminates against religious organizations solely on the basis of their religious character even where the organizations are engaged in charitable activities furthering concededly important social goals. The Conference is concerned that, unless reversed, the district court's flawed Establishment Clause analysis will further derogate the meaning and interpretation of the Religion Clauses and lead to antagonism rather than accommodation between government and religion.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

By its enactment of the Adolescent Family Life Act, 42 U.S.C. §§ 300z to 300z-10 (1982) ("AFLA"), Congress recognized that problems of national significance—adolescent sexual activity and pregnancy—require strong and effective solutions. Congress chose one of many possible approaches to the problem—the involvement of parents in the lives of their children supported by the available resources of the community, including religious and charitable groups as appropriate. Integrating these private and public organizations into such a social welfare program does not even remotely approach government sponsorship or financing of religion. By promoting self-discipline and other prudent approaches to the matter of adolescent sexuality, and by encouraging adoption as an alternative to abortion for adolescent pregnancy (42 U.S.C. § 300z(d)), Congress has taken a course that is "as much a reflection of 'traditionalist' values . . . as it is an embodiment of the views of any particular religion." *Harris v. McRae*, 448 U.S. 297, 319 (1980).

When the district court condemned the inclusion of religiously affiliated organizations in the mix of government and private groups permitted to participate in AFLA grants, it misconstrued the true purpose of the Establishment Clause as illuminated by history and experienced in practice. History teaches that by prohibiting the Congress from enacting laws "respecting an establishment of religion," the Framers of the first amendment [1] intended to bar the new federal government from interfering in matters of religious belief, practice, or governance, yet preserve to the states some measure of freedom to deal with churches in matters promoting the common good. Total separation of church and state was never required, is not desirable, and would be quite impossible to achieve. *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). Given these realities, this Court has stressed that a declaration of unconstitutionality should occur only when, by realistic measure, the state is clearly and directly sponsoring or financing religious activity. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

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[1] The Religion Clauses of the first amendment to the Constitution read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

By relying solely on a strict separation of church and state, the district court ignored this Court's mandate that government must direct its actions toward a "benevolent neutrality" as it concerns religion. *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970). Instead the lower court's "scrupulous neutrality" would require discrimination against any or *all* religions equally. Thus did the court lapse into that hostility toward religion that is itself a threat to religious liberty. *See Engel v. Vitale*, 370 U.S. 421, 442 (1962).

By contrast, the AFLA exemplifies benevolent neutrality in that Congress merely recognized that religious groups, like other community and charitable groups, can contribute to the resolution of the national problem of adolescent pregnancy. On its face the AFLA is religiously neutral; that the policy it embodies may coincide with the views of particular religions does not remotely approach the threshold of religious activity that would implicate the Establishment Clause. *See Harris v. McRae*, 448 U.S. at 319-20. The judgment of the lower court, barring all religious organizations from participation in the AFLA, must be reversed.

ARGUMENT

Since the early days of the Republic, this Court, with due regard to the principles of federalism, separation of powers, and judicial restraint, has declared that acts of Congress will be accorded every presumption in their favor when attacked as being in conflict with the requirements of the Constitution. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810); *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 415 (1850). This deference to the considered judgments of Congress is due in part to the fact that "Congress is a co-equal branch of government whose Members take the same oath [judges] do to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). This Court recently reiterated that it is "not willing to assume now that there

exists a significant problem of legislators who perform their legislative duties with indifference to the constitutionality of the statutes they enact." *Illinois v. Krull*, 107 S.Ct. 1160, 1168 n.8 (1987).

Even the district court acknowledged the principle "that a Court must avoid, if possible, finding that a statute does not conform to the requirements of the Constitution." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1552 (D.D.C. 1987). Incredibly, the district court then abandoned the principle entirely claiming that it is "at odds with Establishment Clause case law." 657 F. Supp. at 1552. This would be a surprising turnaround under any circumstances, but it is particularly unsupportable here where Congress specifically considered the constitutionality of the Adolescent Family Life Act, 42 U.S.C. §§ 300z to 300z-10 (1982) *during the pendency of this litigation*, and concluded that the inclusion of religious groups among permissible grantees is constitutional. S. Rep. No. 98-496, 98th Cong., 2d Sess. 9-10 (1984). This finding, which should have been given great weight (*Rostker v. Goldberg*, 453 U.S. at 64), was ignored by the lower court. Having thus started off in the wrong direction, the court inevitably came to incorrect conclusions regarding the constitutionality of the participation of religiously affiliated groups in the AFLA.[2]

I

BENEVOLENT NEUTRALITY, NOT SEPARATISM, MUST BE AT THE HEART OF ESTABLISHMENT CLAUSE ANALYSIS.

In their original memorandum before the district court, plaintiffs argued "that two of the central principles be-

[2] On August 13, 1987, the district court upheld the remainder of the AFLA, after severing the participation of religious organizations. Plaintiffs below have cross-appealed that ruling (No. 87-462). The Conference's participation as *amicus curiae* in Nos. 87-253 and 87-431 is limited to the district court's ruling that the AFLA is unconstitutional on its face under the Establishment Clause.

hind the Establishment Clause are those of 'separatism' and 'neutrality'."[3] Plaintiffs conceded that "[t]he principle that benefits must be distributed neutrally without regard to religion was stated in *Everson v. Bd. of Educ.* [330 U.S. 1, 16 (1947)]" citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).[4] Perhaps recognizing that this concession would support the AFLA's method for distributing grants to a variety of volunteer and community organizations, plaintiffs never explained the neutrality envisioned by this Court in *Walz v. Tax Comm'n*, 397 U.S. at 669. Instead, they vigorously pursued "separatism," embracing the "wall of separation between church and State," found in *Reynolds v. United States*, 98 U.S. 145, 164 (1878) and originating in an 1802 letter by Thomas Jefferson to the Danbury Baptist Association.

When the district court wrote its opinion supporting plaintiffs' attack upon the social welfare program established by the AFLA, the "benevolent neutrality" of *Walz* (397 U.S. at 669) had been transformed into "scrupulous neutrality" (657 F. Supp. at 1566), and the "wall of separation" was firmly erected as the sole basis for the Establishment Clause's existence (657 F. Supp. at 1569). As the court's only philosophical and historical basis for interpreting the Establishment Clause, Thomas Jefferson's unfortunate choice of words has led, in this case, to the complete exclusion of numerous charitable, nonprofit organizations from participation in a program for the public benefit simply because those organizations are affiliated with religion. This regrettable result is one that would surely surprise the Framers of the Constitution and the states that originally ratified the Bill of Rights.

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[3] Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 11 (November 19, 1984).

[4] *Id.*

A. History Demonstrates That "Separatism" Was Not A Value Sought To Be Protected By The Establishment Clause.

Despite this Court's regular insistence that the history of the first amendment aid interpretation of the Religion Clauses,[5] the district court's sole historical underpinning to its lengthy opinion is contained in one brief reference to Thomas Jefferson's "wall of separation" between church and state. 657 F. Supp. at 1569. Whatever efficacy Jefferson's statement had in Establishment Clause analysis, it was thoroughly discredited by Chief Justice Rehnquist's scholarly dissertation on the history of the first amendment in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). As there explained, the wall has become a "blurred, indistinct, and variable barrier" which "is not wholly accurate" and can only be "dimly perceived." 472 U.S. at 112.[6] "The concept of a 'wall' of separation is a useful figure of speech . . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." *Lynch v. Donnelly*, 465 U.S. at 673. History is much more illuminating.

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[5] *E.g., Edwards v. Aguillard*, 107 S.Ct. 2573, 2589-90 (1987) (Powell, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 673-76 (1984); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 770 (1973); *McGowan v. Maryland* 366 U.S. 420, 437-41 (1961).

[6] At best, the wall of separation is little more that a "useful signpost" on the road to legitimate Establishment Clause analysis. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982). But more sign posts, providing additional guidance, are surely needed on a road that "has become 'as winding as the famous serpentine wall' [Jefferson] designed for the University of Virginia." *Nyquist*, 413 U.S. at 761 (quoting *McCollum v. Bd. of Educ.* 333 U.S. 203, 238 (1948) (Jackson, J., concurring). As Justice Douglas, writing for the Court in *Zorach v. Clauson*, stated: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." 343 U.S. 306, 312 (1952).

The history of the drafting and negotiations that led to the wording of the Religion Clauses as finally adopted by the First Congress is detailed by the Chief Justice in *Wallace v. Jaffree*.[7] The generative process that resulted in the Establishment Clause shows that it had two purposes: first, to prevent Congress from establishing or favoring a *national* religion; second, to prevent Congress from interfering with the *states'* policies with regard to religion.[8] The phrase "respecting an establishment" did not mean merely concerning or touching upon religion. Indeed, Representative Livermore of New Hampshire had proposed such language in the House of Representatives on August 15, 1789, and his proposal was rejected.[9] As the Chief Justice points out:

> None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require the Government to be absolutely neutral as between religion and irreligion.

Wallace v. Jaffree, 472 U.S. at 99. There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was in any way intended to

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[7] 472 U.S. at 92-98. As *amicus curiae*, the Conference reviewed the history of the Establishment Clause in, *e.g.*, *Mueller v. Allen*, 463 U.S. 388 (1983); *Aguilar v. Felton*, 473 U.S. 402 (1985); and *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

[8] 1 *Annals of Congress* 730-31 (Gales & Seaton eds. 1789); Corwin, *The Supreme Court As National School Board*, 14 Law and Contemp. Probs. 3, 11 (1949); I A. Stokes, *Church and State in the United States* 539-40 (1950); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment* 16 (1978).

[9] Livermore's terminology was: "Congress shall make no laws touching religion, or infringing the rights of conscience."

alter the meaning of an *established* religion as being a *national* religion.[10]

The language of the Religion Clauses as ratified does not concern itself with religion in general, but with the particular problem of the fear of a national religion. The Framers of the Constitution "had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people . . .; they did not intend to spread over all the public authorities and the whole public action of the nation, the dead and revolting spectacle of an atheistical apathy." S. Rep. No. 376, 32d Cong., 1st Sess. 4 (1853); *see also Zorach v. Clauson*, 343 U.S. at 312. Any doubt on this point was surely dispelled by the early congressional actions accommodating and even directly benefiting religion in general. *Lynch v. Donnelly*, 465 U.S. at 675-78; *Marsh v. Chambers*, 463 U.S. 783, 786-90 (1983); *Wallace v. Jaffree*, 472 U.S. at 99-110. The Clauses were included in the Bill of Rights:

> . . . not as a protection *from* religion, but rather as a protection *for* religion. They were inserted in our Constitution largely because its framers felt that they were important to ensure the continuance and the strengthening of religion, which could not flourish under American conditions if any State Church were either provided for or tolerated.

I A. Stokes, *Church and State in the United States* 556 (1950).

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[10] At the time of the Constitutional Convention, there was a wide diversity of views and practices among the states regarding established religion. *See* III *Debates on the Adoption of the Federal Constitution* 330 (J. Elliot 2d ed. 1836). The Religion Clauses were molded to meet the needs and wishes not only of the people of Virginia, whose proposal was not adopted, but of the varied and sometimes widely divergent views of all the states on the appropriate relation of government to religion. The Virginia model cannot reasonably be presumed to have been the desired prototype of states that for themselves selected very different models of church-state accommodation. Stokes, *supra* note 8, at 444, citing S. Cobb, *The Rise of Religious Liberty in America* 507 (1902).

The Bill of Rights took effect when the Commonwealth of Virginia finally ratified the first ten amendments to the United States Constitution on December 15, 1791. Two years earlier, when the Virginia legislators initially considered the amendments proposed by the First Congress, they postponed ratification and stated their objection to the Religion Clauses:

> The [first] amendment, recommended by Congress, does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time, render it as powerful and dangerous as if it was established as the national religion of the country.
>
> This amendment then, when considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia and other states, for the protection of these rights.

Journal of the Senate of the Commonwealth of Virginia, 1785-1790 62-63 (1828). However, no change to the wording of the first amendment occurred between the time of this statement and Virginia's ultimate ratification.

There was no concern expressed during those first congressional debates that the government might enact a law beneficial to religion or religious institutions. 1 *Annals of Congress* 730-31 (Gales & Seaton eds. 1789). "The fact that the founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."

Edwards v. Aguillard, 107 S.Ct. 2573, 2598 (1987) (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963)). The amendment reflects the experience of its Framers that officially preferred or nationally established religion generates religious intolerance and infringes upon personal liberty. *E.g., School District of Abington Township v. Schempp*, 374 U.S. at 221-22; *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). The Establishment Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty. *See Lynch v. Donnelly*, 465 U.S. at 683. The Framers of the Constitution would be surprised, no doubt, to hear a federal court condemning "cooperation between government and religion to further mutually agreeable objectives" and declaring a statute unconstitutional under the first amendment even though the law "emanates from well-founded and benign intentions" and has "a laudable purpose." 657 F. Supp. at 1569.

While also asserting its intention to protect religious freedom, the district court, by excluding religious organizations from participation in the AFLA, has relegated such organizations to a lower status within the nonprofit and charitable community. Quoting *Engel v. Vitale*,[11] the district court, in effect, has done exactly what *Engel* warns against. As applied to the opinion below, the quotation from *Engel* should be made to read:

> When the power, prestige, and financial support of government is placed [against] religious belief, the indirect coercive pressure upon religious [individuals and organizations] to conform to the prevailing officially approved [non]religion is plain.

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[11] "When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

It is equally plain that a society is only truly free when its people and institutions are free from direct or indirect pressure to abandon their own cherished religious beliefs in order to participate in a government program for the benefit of society. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

It is essential, therefore, that this Court disavow the lower court's adherence to Jefferson's "wall of separation" in order to protect religion from government coercion and discrimination. As is usually the case when jurisprudential terminology becomes oversimplified, and legal principles become part of the vernacular, the concept of the "separation of church and state" is today more a problem than a precept.[12] The strict separatism advocated by the plaintiffs below, and adopted by the district court, leads to the indefensible view that religious organizations and individuals should be excluded from government participation simply because they are religious. Such a result has no roots in the history of the first amendment.

B. When Neutrality Ceases To Be Benevolent, Suppression Rather Than Accommodation Of Religion Is The Result.

It is imperative to distinguish the "scrupulous neutrality" that can impair the free exercise of religion from the "benevolent neutrality" that is at the heart of this

[12] A practical example of how simplistic thinking about separation can lead to hostility appeared in *The Washington Post*, Dec. 19, 1987, during the pendency of this appeal. Under the headline "Christmas Is Banned in North Pole, Alaska," the Associated Press reported that the principal of the high school in North Pole, Alaska, had banned the use of the word "Christmas." School officials said they were forbidding use of the nine-letter word in order to comply with the separation of church and state. The principal reportedly stated that they were merely trying to make sure one religion or belief was not advocated over another. Certainly, no one could seriously attempt to reconcile the school's regulation with this Court's Establishment Clause jurisprudence.

Court's opinion in *Walz* and recently reaffirmed in *Corporation of the Presiding Bishop v. Amos*, 107 S.Ct. 2862, 2867 (1987). Neutrality does *not* mean suppressing all religions equally. This is the mistake that the district court made when it condemned all AFLA grantees that had any religious affiliation, whether Catholic or Jewish, Lutheran or Buddhist. 657 F. Supp. at 1564-66. Official prejudice against all religions or against only majority faiths is equally reprehensible whether it comes from a district court or from a state employee (*see* note 12, *supra*). Even where such oppression of religion results from measured indifference rather than intentional discrimination, it is at odds with this Court's dictates that religion be allowed to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. at 313.

Two fundamental similarities between this case and the *Walz* case should be mentioned before expanding on the principle of benevolent neutrality. The first similarity is that neither this case nor *Walz* involves direct money subsidies to churches. 397 U.S. at 675, 690. *Walz*, of course, involves the exemption of church property from state taxes. This case involves federal grants made available to religious organizations for *secular* purposes.[13] While both may indirectly benefit religion, neither provides government financing for religious activity. AFLA grants are directed to secular activities and the ultimate beneficiaries of the AFLA program are the families that receive counseling and care services from the AFLA grantee.

The other equally important similarity between this case and *Walz* is that the benefit in both cases is made available to a broad class of institutions dedicated to pub-

[13] That religious organizations receiving AFLA grants perform an important role in furthering secular values is not in dispute. This was found by the district court and admitted by the plaintiffs below. 657 F. Supp. at 1559.

lic service. In *Walz*, the tax exemption applied to houses of worship together with hospitals, libraries, art galleries, and other professional, historical and patriotic organizations. 397 U.S. at 671. AFLA grantees likewise include a myriad of community organizations, charitable institutions, voluntary associations, religious organizations and other groups. 42 U.S.C. § 300z-5(a)(21)(B). Therefore, the AFLA can fairly be compared to "[t]he statute that implements New York's constitutional provision for tax exemptions to religious organizations" since both statutes define a class of "entities whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement and the doing of 'good works' by performing certain social services in the community that might otherwise have to be assumed by government." *Walz*, 397 U.S. at 696 (Harlan, J., concurring). On this basis, Justice Harlan found the tax exemption statute to satisfy his standards for neutrality by not excluding from its coverage any group that could reasonably be included within the definition of the goals of the statutory scheme. 397 U.S. at 696. Similarly the AFLA, until the district court excluded religious organizations, met this standard of neutrality.

But simple neutrality alone is not enough, for as former Chief Justice Burger has said:

> The course of constitutional neutrality in this area cannot be an absolutely straight line: rigidity could well defeat the basic purpose of these provisions [the Religion Clauses], which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or government interference with religion. Short of these expressly proscribed governmental acts, there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

Walz, 397 U.S. at 669-70 (emphasis added). Such neutrality must not be "rigid" or "scrupulous" because, as the Chief Justice added:

> The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. (citations omitted).

397 U.S. at 673. The importance of this affirmation of the role that religion plays in our society is highlighted by the concurring opinion of Justice Brennan. *Walz*, 397 U.S. at 687-89.

Justice Brennan's elaboration of the justification for exempting churches from property taxes could well be applied with little modification as the reasons for including religious organizations among the groups eligible for AFLA grants:

> First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.
>
> * * * *
>
> Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.

Walz, 397 U.S. at 688-89. Just as the "very breadth" of the scheme of tax exemptions negated any "suggestion

that the state intends to single out religious organizations for preference," the same breadth and diversity of the groups included in the AFLA scheme negate any suggestion that the federal government intends to favor religious organizations by this important social legislation. *Walz*, 397 U.S. at 689.

Since history shows that separatism was not intended to be the philosophical underpinning of the Establishment Clause, and since in practice both strict separation and rigid neutrality lead to hostility toward religion generally, benevolent neutrality must serve as the baseline for legitimate and balanced Establishment Clause analysis. Measured by that touchstone, the district court's opinion fails.

II

THE AFLA EXPRESSES VALID SOCIAL POLICY AND IS NOT A RELIGIOUS PREFERENCE.

Adolescent sexual activity and pregnancy are social problems of national significance. In its considered judgment, Congress enacted the AFLA to stress self-discipline and abstinence as solutions to the problem of adolescent sexual activity, and to prefer adoption over abortion as a solution to adolescent pregnancy.[14] In the AFLA, Congress recognized that religious organizations, like other community and charitable groups, can contribute to the resolution of these national problems. That some of the religious organizations involved in AFLA grants may agree with congressional judgment about appropriate solutions to the problem is a wholly insufficient reason to declare the AFLA unconstitutional on Establishment Clause grounds. This Court has so held in its opinion in *Harris v. McRae*, 448 U.S. at 319-20.

Issues of adolescent sexual activity and pregnancy are no different in principle from the myriad of other social

[14] The AFLA is not the only appoach Congress has taken to address these and related social problems. *See, e.g.*, 42 U.S.C. §§ 300 to 300a-6a (1982 & Supp. 1987).

welfare issues about which the government and many religious organizations share a common concern. The Conference has addressed controversial and diverse issues of national significance, such as the "fairness doctrine," military expenditures, full employment, fair housing, farm credit, Medicaid funding, minimum wage, plant closings, welfare reform, international banking practices, third-world debt, United Nations funding, and immigration issues, to name a few. The Conference often expresses its views in the context of the legislative process. There could be no reasonable suggestion that every law espousing values which happened to accord with the views of the Conference thereby violates the Establishment Clause. Such a suggestion would be contrary to the intentions of the Framers of the Establishment Clause.[15] Invalidating laws which express common concerns as "establishments of religion" defies logic and does a disservice to the legitimate goals of both government and religion.

A. The Participation Of Religious Organizations In The AFLA Is Constitutionally Permissible Pursuant To *Harris v. McRae*.

Close to the core of the district court's opinion in this case is its suspicion of those religious organizations, participating as grantees under the AFLA, whose religious tenets coincide with the social values expressed in the AFLA. In the words of the court below:

> It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful. (citations omitted). The AFLA does not prohibit these religions from receiving AFLA grants. Thus

[15] Recognizing the inevitability that church and state will have some overlapping interests, at least one member of this Court would narrow the field of controversy to those "statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment." *Wallace v. Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring).

> by contemplating provision of aid to organizations affiliated with these religions—aid for the purpose of increasing abstention and adoption—the AFLA contemplates subsidizing the fundamental religious mission of those organizations.

657 F. Supp. at 1563. But this Court has clearly held in *Harris*, 448 U.S. at 319-20, "that the fact that the funding restrictions in [a statute] may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." Plaintiffs in *Harris* challenged the Hyde Amendment on Establishment Clause grounds claiming that it incorporated into law certain doctrines held by the Roman Catholic Church. The Hyde Amendment severely restricted Medicaid funding for abortions to those necessary to save the life or health of the mother or those arising out of rape or incest under limited circumstances. Although the district court in *Harris* examined the Hyde Amendment pursuant to a *Lemon v. Kurtzman* analysis [16], and found it constitutional, this Court reached the above-quoted holding without employing the *Lemon* analysis or any other test. This was done by deciding, at the threshold, whether a religious preference was at the center of the legislation.

Critical to the holding in *Harris* was this Court's conclusion that the Hyde Amendment expressed "social policy" reflecting Congress' "balancing of competing interests." 448 U.S. at 326. The AFLA is likewise a legitimate expression of social policy. It prefers childbirth to abortion by encouraging adoption, and promotes abstinence and self-discipline as solutions to the problem of adolescent sexual activity. If there is any doubt that

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[16] In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court announced three criteria for determining Establishment Clause challenges to the constitutionality of state actions: the statute must have a secular purpose; its principal or primary effect must neither advance nor inhibit religion; it must not foster an excessive government entanglement with religion.

the AFLA is, on its face, legitimate social policy, Congress' statement of its findings is clear. 42 U.S.C. § 300z(a) (1982 & Supp. 1987). It recites the probabilities of familial, medical, social, and economic consequences arising out of the large numbers of adolescent pregnancies occurring in the United States. Moreover, even the district court has acknowledged that "the AFLA has a valid secular purpose . . . . [It] was motivated by Congress' concern that teenage pregnancy and premarital sexual relations are very damaging to society and, particularly, to adolescents (footnote omitted)." 657 F. Supp. at 1558.

Like the Hyde Amendment at issue in *Harris*, the AFLA does no more than promote values—abstinence, and adoption as an abortion alternative—which are coincident with tenets of some religions. By ignoring the teaching of *Harris* and presuming, therefore, the need to apply the *Lemon* test to the AFLA, the district court manifested an analytical error that must now be corrected.

B. This Court Should Apply A Threshold Analysis To Conduct Challenged Under The Establishment Clause To Test For The Possibility Of A Religious Preference.

The reasoning employed in *Harris* was not novel but constituted a specific application of the policy of benevolent neutrality appropriately employed in Establishment Clause analysis. As this Court stated in *Walz*, the boundaries of the Establishment and Free Exercise Clauses of the first amendment are not coextensive. 397 U.S. at 673. Thus, state action which has the effect of benefiting religion more liberally than a scrupulous interpretation of the Free Exercise Clause might is not thereby invalid. There must be something more to result in an

Establishment Clause violation.[17] *Walz*, 397 U.S. at 668. No detailed test need be applied to adjudicate the constitutionality of any statute under the Establishment Clause until there is a threshold determination that, at its core, the state has become impermissibly involved in religious activities. This is especially important where the test applied—the *Lemon* test—is fraught with imprecision and difficulty.[18]

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[17] This approach has been recently articulated in a manner particularly relevant to the facts of the present case:

> In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interest of the government and the religious interests of various sects and their adherents will frequently intersect, conflict and combine. A statute that ostensibly promotes a secular interest often has an incidental *or even a primary effect of helping or hindering a sectarian belief*. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical commandment against killing. The task for the Court is to sort out those statutes and government practices whose purposes and effect go against the grain of religious liberty protected by the First Amendment.

Wallace v. Jaffree, 472 U.S. at 69-70 (O'Connor, J., concurring) (emphasis added).

[18] Beginning in *Lemon* itself, Justice White criticized the "excessive entanglement" prong of the test on the grounds that it creates an "insoluble paradox." 403 U.S. at 668. In her concurrence in *Wallace v. Jaffree*, Justice O'Connor noted that *Lemon's* standards should be "reexamined and refined" to make them more useful in achieving first amendment goals. 472 U.S. at 68-70. Chief Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. at 108-13, sharply criticized each prong of the *Lemon* test, and highlighted its paradoxical results. 472 U.S. at 110-11. Justice Scalia has most recently been sharp critical of the test in *Edwards v. Aguillard*, 107 S.Ct. at 2593-96.

It is not the purpose of this *amicus* brief to address the inadequacy of the *Lemon* test but rather its unnecessary application to the present case. *But see* briefs *amicus curiae*, *supra* note 7.

An appropriate threshold inquiry to determine whether a particular statute even raises Establishment Clause issues has been suggested by this Court. Beginning in *Walz* and continuing through *Lemon* to the present, this Court has maintained that there are three particular "evils" against which the Establishment Clause was intended to protect: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[19] *Walz*, 397 U.S. at 668; *see also Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 381 (1985). Where a statute does not directly present impermissible government sponsorship of, financial support for, or involvement in religious activity, no detailed application of the *Lemon* test should be undertaken. The heart of the inquiry is the phrase "religious activity."[20] When the activity or conduct under consideration is purely a *social welfare* activity, there is no need for this Court to engage in a detailed process to determine whether the incidental involvement of religious organizations is legitimate.

This concept of a threshold test is borne out by *Harris*. While, in *Harris*, this Court did not state explicitly that it employed the suggested threshold inquiry, the inquiry logically preceded further Establishment Clause analysis. Significantly, the *Harris* Court identified the Hyde Amendment as a "social policy" (448 U.S. at 324-26) and held that the existence of concurrence between

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[19] This precept complements the two purposes of the Clause set forth, *supra* at 8, in I.A.: to prevent Congress from establishing or favoring a national religion, and from interfering with the state's policies regarding religion. The "evils" identified by this Court constitute ways in which government may contravene these purposes.

[20] Definitions of religious activity are best left to each faith's own understandings while "the juridicial definition of religion can remain broad and indeterminate." Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 Public Law Forum 325, 348 (1985).

religious beliefs and a state's social policies did not suffice to invalidate the legislation under the Establishment Clause. 448 U.S. at 319-20. In the case at hand, therefore, the district court applied *Lemon* in a situation where it clearly should not have even considered further Establishment Clause analysis. In the AFLA, the government is neither sponsoring nor involving itself in religious activities when it permits contributions of religious organizations to resolve complex social problems. The nature of the administrator does not convert the character of activities from a government program to a religious activity.

Nor does the AFLA implicate financial support for religious activities. Religious organizations are often in the "state's pay" for secular purposes without violation of the Establishment Clause. *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976) "It could scarcely be otherwise, or individuals would be discriminated against for their religion, and this Nation would have to abandon its accepted practice of allowing members of religious orders to serve in the Congress and in other public offices." 428 U.S. at 746 n.13. In *Bradfield v. Roberts*, 175 U.S. 291 (1899), this Court upheld the provision of public aid to a corporation consisting entirely of Roman Catholic sisters operating a hospital. Permissible purposes do not become impermissible because they are approved of by one or more religious groups or because religious organizations receive grants limited to those purposes. To conclude otherwise demonstrates hostility toward religion, reflected in the judgment that the coincidence between religion and otherwise acceptable, and even admirable, social goals is unconstitutional.

The AFLA recognizes religious organizations as one among many kinds of social welfare, charitable, and community groups able to deliver services to troubled children and their families concerning adolescent sexual activity and pregnancy. The AFLA does not benefit or

prefer religion by providing financial support, sponsorship, or government involvement with any religious activities. Like the Hyde Amendment at issue in *Harris*, the AFLA expresses valid social policy and is not a religious preference. This Court would add a needed measure of analytical clarity by firmly establishing this principle in reversing the district court.

CONCLUSION

For the foregoing reasons, the judgment of the district court barring participation by religious organizations in the AFLA should be reversed.

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